

Hearing:
April 7, 1998

Paper No. 92
RLS/KRD

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB
U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Touch Tel Corporation
v.
AirTouch Communications

Opposition Nos. 97,328 and 99,129,
to applications Serial Nos. 74/487,071
and 74/478,131,
filed on February 7 and January 10, 1994, respectively

Carla B. Oakley of Morrison & Foerster for Touch Tel
Corporation.

Caroline N. Mitchell of Pillsbury Madison & Sutro for
AirTouch Communications.

Before Simms, Cissel and Seeherman, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Touch Tel Corporation (opposer), a California
corporation, has opposed two applications owned by AirTouch
Communications (applicant), also a California corporation,
by change of name from PacTel Corporation, to register the
marks AIRTOUCH and AIR TOUCH and design¹ for electrical
apparatus, namely, telephones, pagers, and software for use

in connection therewith, in Class 9; and wireless voice and wireless data telecommunications services, namely, cellular, paging, and switching and transmission services for the carriage and provision of access to various information services, in Class 38.²

In the notices of opposition, opposer has asserted that it sells pagers and pager services; that prior to the filing date of applicant's applications, it has used the mark TOUCH TEL PAGING and the trade name Touch Tel; that opposer has registered the mark TOUCH TEL PAGING for pagers for use in paging systems and for paging services in connection with paging systems;³ and that applicant's mark⁴ so resembles opposer's mark and trade name as to be likely to cause confusion, to cause mistake or to deceive. Opposer has also asserted that applicant's mark may disparage opposer and that applicant's mark falsely suggests a connection with opposer. With respect to the latter grounds, however, opposer has offered no proof or argument and we have not further considered these claims.

¹ For convenience, we shall generally refer to applicant's marks in the singular, in the style "AirTouch."

² Application Serial No. 74/478,131, filed January 10, 1994, based upon applicant's assertion of a bona fide intention to use the mark in commerce; and Application Serial No. 74/487,071, filed February 7, 1994, based upon applicant's assertion of a bona fide intention to use the mark in commerce. The motion to amend the identification to that set forth above is hereby granted.

³ Registration No. 1,686,092, issued May 12, 1992, Sections 8 and 15 affidavit accepted and filed, respectively.

In its amended answers, applicant has denied the essential allegations of the notices of opposition. However, applicant has admitted the existence of opposer's registration. Applicant has also asserted the affirmative defenses of laches, unclean hands and estoppel. (These defenses have not been pressed by applicant and so they, too, have not been considered.) On April 26, 1996, the above-identified oppositions were consolidated.

Briefly, the record of this case consists of voluminous testimony (and exhibits) submitted by both parties; portions of printed publications, portions of discovery responses and discovery depositions, official records including opposer's own registration and third-party registrations, all relied upon by notices of reliance of the parties; and the application files. Both parties have submitted briefs and an oral hearing was held.

Procedural Rulings

On March 9, 1998, the Board deferred action on two motions to strike testimony depositions, one motion filed by applicant and one filed by opposer.

Applicant moved to strike the testimony of Terry Bryan, the president of Paging Communications. Mr. Bryan was called by opposer as a rebuttal witness concerning instances of actual confusion. It is applicant's position that this

witness should have been presented as part of opposer's testimony-in-chief and not as a rebuttal witness of the testimony adduced by applicant concerning the lack of instances of actual confusion. Applicant contends that Mr. Bryan's testimony does not rebut any specific testimony or evidence offered by applicant. It is applicant's position that opposer chose not to call Mr. Bryan during its principal testimony period and that opposer should not be able to call this witness on rebuttal. Opposer, on the other hand, argues that the testimony of Mr. Bryan is proper rebuttal as it tends to refute the testimony of applicant's witnesses concerning the lack of actual confusion. Opposer also notes that applicant cross-examined Mr. Bryan during rebuttal and did not object at that time to this testimony as improper rebuttal.

Applicant's motion to strike Mr. Bryan's testimony is granted. Testimony with respect to instances of actual confusion should be offered in a party's testimony-in-chief and not as part of rebuttal. See *National Bakers Services, Inc. v. Hain Pure Food Co., Inc.*, 210 USPQ 156, 157 (TTAB 1980) and *Autac Inc. v. Walco Systems, Inc.*, 195 USPQ 11, 13 n.3 (TTAB 1977). Also, objections to a testimony deposition on the ground that the testimony constitutes improper rebuttal are not waived for failure to make them before or during the taking of the deposition. See TBMP §718.03(c).

Opposer moved to strike the testimony of Dr. Sandra Cogan, an expert survey witness called by applicant. The facts concerning this testimony are as follows. During discovery, applicant was asked to indicate the identity of any expert hired by applicant in connection with these opposition proceedings. Applicant answered this discovery request on April 15, 1996, shortly before the discovery period was to close, stating that it had not hired an expert in connection with these proceedings. Shortly after the discovery period closed, applicant contacted a survey expert for the purpose of conducting a likelihood-of-confusion survey. In the meantime, opposer offered its testimony during its testimony period. Applicant received Dr. Cogan's survey report on August 5, 1996. Applicant then decided to call this witness during applicant's testimony period and gave opposer certain materials from Dr. Cogan on August 9, 1996. Shortly thereafter, applicant noticed the taking of the testimony deposition of Dr. Cogan, and her testimony was scheduled for six days later. This testimony was subsequently postponed to allow opposer time in which to prepare for its cross-examination of Dr. Cogan.

In support of opposer's motion to strike, opposer argues that the disclosure of applicant's expert witness after the closing of opposer's testimony and after applicant's testimony period had begun was untimely. As a

result, opposer argues that applicant never made the expert available for discovery, and this expert was cross-examined "under protest." According to opposer, applicant's tactics prevented opposer from presenting expert testimony in its own case-in-chief. See opposer's motion to strike, 8.

Applicant, on the other hand, states that it truthfully answered opposer's discovery requests, and first contacted the potential witness after discovery was closed. Applicant argues (correctly) that, under Board practice, a party need not identify an expert witness until it decides to call that witness. Applicant contends that it disclosed the identity of the expert when the survey was completed and as soon as it decided to use the survey as evidence, and that applicant had no obligation to amend its discovery responses until that time. In addition, applicant argues that it gave opposer additional time to prepare (more than one month) for the examination of this witness.⁵

Opposer's motion to strike is denied. Under the circumstances of this case, we believe that applicant's disclosure of its expert witness was timely. See TBMP §419(7). Discovery before the Board is similar in many respects to discovery before federal district courts under the Federal Rules of Civil Procedure. However, there are

⁵ Applicant's counsel also states that, although opposer never asked for discovery of Dr. Cogan and even though the discovery

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some differences. See "Effect of December 1, 1993 Amendments to the Federal Rules of Civil Procedure on Trademark Trial and Appeal Board Inter Partes Proceedings," 1159 TMOG 14 (February 1, 1994). The Board has not adopted the automatic disclosure amendments of the Federal Rules of Civil Procedure. Moreover, opposer was, of course, free to hire its own expert and to submit its own survey during its case-in-chief and did, in fact, take the testimony of an expert witness criticizing applicant's survey during opposer's rebuttal testimony period.

We also note that there are a great number of objections to testimony and exhibits made during the course of the many and sometimes voluminous testimony depositions. Suffice it to say that, except as indicated above, we have read all of the testimony and examined the exhibits and have accorded them appropriate weight. We would be remiss if we did not point out that many of the objections seem frivolous and dilatory and did not serve to advance this case.

Opposer's Record

According to Mr. Robert Cooper, opposer's president, opposer is a communication service provider which provides paging services (since 1988) to businesses as well as to individuals. Opposer sells various brands of pagers and is a paging airtime carrier, which means that it provides

period had closed, she would have allowed a discovery deposition

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airtime service for pagers on its own system. Airtime is the term for the service that allows the pager to receive a message. Opposer also resells the airtime of other paging carriers, which enables the pager to receive messages in different geographical areas.⁶ In addition, opposer renders site rental business services, involving the providing of radio communications and video communications transmission facilities to businesses and paging companies; and commercial mobile radio services (CMRS) or two-way marine telephone communications for fishing and work boats. The latter service is of recent vintage for opposer.

Most of opposer's paging subscribers are located in California, with most of those being in Northern California, but opposer also renders its services in Nevada and Arizona. However, opposer does not offer nationwide paging service. Opposer considers its competition to be paging companies.

Over the years, opposer's paging services have increasingly been sold to individuals for personal as well as business use. In fact, 60 to 65 percent of opposer's business is now with individuals. Opposer has between 15,000 and 20,000 paging customers. Mr. Cooper testified that opposer spends about \$85,000 to \$100,000 per year on

of the witness.

⁶ A pager may be recrystallized (or have its frequency changed) to receive airtime from another paging carrier, if a customer decides to change its airtime carrier.

advertising (radio, newspapers, magazines, the Yellow Pages and direct mail). According to Mr. Cooper, opposer also now offers cellular phone services to individuals under the mark TOUCH TEL, but this has been described as an "incidental" service, at least at the time of the testimony. Indeed, the extent of opposer's cellular service is unclear from this record. Opposer does not use its mark and trade name in connection with the cellular phones themselves and the cellular airtime of opposer's cellular services is provided by others; that is, opposer resells the airtime of other cellular carriers. Opposer is not a cellular carrier or an operator of a cellular system and does not hold a cellular license. However, it has entered into a marketing arrangement with Nextel Communications to distribute the latter's products. Opposer has not advertised its TOUCH TEL PAGING mark in connection with cellular services.

Opposer sells its pagers and paging services from several retail locations, including its San Francisco retail showroom called the Pager Store. However, this store is not identified on the outside as affiliated with opposer, although inside near the counter is a large TOUCH TEL sign.

Just as opposer resells the airtime of other carriers, opposer's airtime is resold by other paging companies. In fact, the record shows that some "resellers" have sold the airtime of both opposer and applicant. Also, the testimony

demonstrates that the parties have advertised their goods and services in some of the same media.

During a period of time when there was an interruption in applicant's paging services due to satellite problems, Mr. Cooper testified that he personally answered some phone calls from applicant's customers concerning this interruption in service.

One of opposer's salespersons, Ms. Priscilla Leichner Bee, also testified about alleged instances of actual confusion that she witnessed. These include confusion by a recently hired operator of opposer's answering service who had been an operator for another answering service that had done business with applicant. This person transferred a call of the witness by incorrectly identifying her as "Priscilla from AirTouch." According to the testimony, this individual continues on occasion to misidentify the witness when she calls.⁷ On another occasion, a man who came to opposer's Pager Store wanted his AirTouch pager hooked up, asking if the store sold the AirTouch system. On another occasion, an individual handed the witness an AirTouch pager, saying that it would not be difficult for her to activate it because it was already "one of yours" or words to that effect. However, this individual immediately

⁷ Similarly, Mr. Jeffrey Smith, opposer's operations manager, testified that when he went to pick up some recrystallized pagers

corrected herself by indicating that she was confusing opposer with its competition.

While Mr. Cooper testified that there are no current third-party uses of the service mark "TOUCH" in the paging business, Mr. Jeffrey Smith, opposer's operations manager, stated that he was aware of a paging accessories business called In Touch Systems and of the AT&T TRUE TOUCH mark used in connection with telecommunications services.

A private investigator hired by opposer testified that he personally visited the offices of four paging stores that operated under names which included the word "Air." In addition to applicant, these company names were AirCommunications, AirPage and Air Wave Communications. Another private investigator visited paging company offices under the names Air Link Communications, Air Zone Communications and AirCall.

Opposer's mark is also used on such equipment as terminals, transmitters and antennas. The mark was used on transmitters as early as early 1995. These transmitters bearing the mark range in price but can be as expensive as \$12,000. At the time of Mr. Cooper's testimony, 30 to 50 paging transmitters had been sold and 25 to 60 antennas had been sold. Antennas also vary in price but may be as expensive as \$12,000.

from a pager repair shop, he was once introduced as "Jeff from

Applicant's Record

Applicant was formed in 1994 from the wireless communications business of Pacific Telesis, one of the so-called "Baby Bells." Applicant renders cellular, paging and personal communications services (PCS).⁸ According to applicant's vice president of marketing, applicant's primary business is the providing of cellular services. Applicant has over 4 million cellular subscribers in the United States, and derives most of its income from those subscribers. Applicant has sold over 2½ million pagers and has that many paging subscribers in 29 states. Applicant has conducted joint advertising of its paging and cellular services, with its cellular services advertised on television, radio, in print media, in the Yellow Pages and on billboards.

Applicant sells cellular phones and services from its own retail outlets and from various national retail chain stores such as Circuit City, Best Buy, Sears, Wal-Mart, Target and Office Depot, as well as specialty retail outlets. Applicant's 1995 operating revenue was around \$1.6 billion, and applicant has spent millions of dollars each year on advertising. Applicant has over 5,000 employees.

AirTouch." This repair shop resells the airtime of both parties.

⁸ The personal communications services are a relatively new aspect of applicant's services as a result of recent licenses

Applicant's main competitors are AT&T, MCI and Sprint. Applicant is not involved in the video transmission business and does not render two-way radio communication (radio dispatch) services. Also, applicant does not sell paging hardware, except for pagers.

In response to the testimony of some of opposer's witnesses who stated that they were aware of instances of actual confusion, applicant called some of the witnesses who were allegedly confused. For example, applicant took the testimony of Mr. Kevin Chak, a user of a pager provided by opposer who wanted to upgrade his pager service. Although Mr. Chak was aware of applicant (from advertisements), he testified that he was not confused as a result of the use of the respective marks. Additionally, applicant took the testimony of a service manager of Motorola Inc., a remote microwave relay station maintenance worker, and an employee of Intel Corporation, all of whom testified that they were not confused as a result of any similarities of the marks. Motorola's service manager, Emilio Bahena, testified that, although two pagers which should have been shipped to applicant were shipped to opposer, pagers have in the past been shipped to the wrong address as the result of clerical mistake and not as the result of any similarities in the marks. For example, pagers which should have been shipped

from the Federal Communications Commission. These services

to applicant were shipped to PageNet in a mislabeled shipment and vice versa. He further testified that he personally was not confused by the similarities of the respective marks. Also, Ms. Linda Erlich, who had called opposer's Pager Store seeking an AirTouch pager, said that the reason for this call was that she thought that opposer might be a retailer of a variety of pagers.

Several of applicant's witnesses, including applicant's district general manager for the Los Angeles area, testified that they were aware of no instances of actual confusion, and that no distributor, agent or reseller had reported to applicant about any instance of actual confusion. Applicant itself is aware of no misdirected phone calls or mail intended for opposer. Its witnesses testified that, before this proceeding, they had not heard of opposer and its mark.

With respect to third-party usage of marks containing the term "TOUCH," applicant's testimony reveals that several of applicant's witnesses have heard of a company called In Touch Communications, involved in the telecommunications equipment rental business. Mr. Arthur Rosen, the district general manager of AirTouch Paging for the Los Angeles area, said that he was aware of a paging company called Tele-Touch. A Yellow pages advertisement for Rapid Touch Communications cellular and paging services was also

involve mobile telephone services.

introduced.⁹

Applicant also made of record copies of opposer's application that resulted in the registration of its mark, wherein opposer's attorney, to overcome a reference, argued that the term "TOUCH" was "weak" because it was in common use and that the "TEL" portion was dominant. In a response in that application, opposer's attorney also stated that its purchasers were "sophisticated" and "discriminating," because its goods and services involved the expenditure of several hundred dollars per year.

Finally, applicant called Dr. Sandra Cogan, the president of Cogan Research Group, a market research company, who conducted a likelihood-of-confusion survey in this case. Dr. Cogan testified that she had designed and supervised around 60 surveys for trademark, unfair competition and design patent cases, and has been retained as an expert witness over 30 times. In June and July 1996, she conducted 203 in-person interviews of consumers in West Covina, California (Southern California), in San Mateo and San Bruno, California (Northern California), and in Dallas, Texas. Survey respondents were qualified as men and women

⁹ Applicant also introduced Yellow Pages listings of third parties which include the word "Touch" in their names (Keep in Touch, Personal Touch, Magic Touch, etc.). Suffice it to say that, unlike advertisements, mere telephone directory listings

between the ages of 18 and 64 years of age who have cellular phones or pagers or plan to purchase cellular phones or pagers in the next six months. The respondents were shown cellular and paging advertisements of opposer, of applicant and of "control" telecommunications companies. The respondents were asked if they thought that any of these telecommunications companies owned or is owned by the company whose materials were first displayed (Touch Tel). Dr. Cogan stated her conclusions, dep., 83, 97-98 and 100:

So if we add those up, the total source and affiliation confusion, which is 10, plus 3, which is 6 percent, keeping in mind some of them did not indicate name kinds of reasons; however, in the control company, the other companies' advertising shown in Display B, we ended up with an average of 7 percent saying these other companies.

So if we subtract our 7 percent control company confusion from our 6 percent confusion between Touch Tel Paging and AirTouch, we have a minus 1 percent confusion.

* * * * *

Q Okay. Looking at page 2300, tell us what the bottom line of your survey was.

A We had a total source and affiliation confusion between Touch Tel Paging and AirTouch of 6 percent. But I'd like to note that some of those consumers did not say for reasons

are not evidence of service mark use. See In re Broadway Chicken Inc., 38 USPQ2d 1559, 1565 (TTAB 1996) and cases cited therein.

related to the names that they were confused.

We had an average of 7 percent of the 203 consumers naming other companies whose advertising was shown as control in this. And if I subtract from the total of the AirTouch number of 6 percent minus 7 percent confused with other companies, I end up with a minus or 1 percent confusion, which is very low. That's the second lowest confusion I've ever seen in one of these types of likely to lead to confusion surveys.

* * * * *

Those who thought that one of -- or more of the companies shown in the second display, which included AirTouch, was owned by the same company that owns Touch Tel, anybody who indicated that yes, they thought any of these companies were related in that way were also asked, for each company they named, the reason that they thought that they were owned by the same company.

And those reasons are very telling. Of those who thought Touch Tel Paging and AirTouch were owned by the same company, four respondents, only four out of the ten said something about the name or word "Touch." And the others really guessed about the relationship; so really, we only had -- instead of ten, which is 5 percent out of the 223 [sic], we really only had four, which is 2 percent, who gave reasons -- source confusion reasons that related to the name itself.

Opposer's Rebuttal

On rebuttal, Mr. Jeffrey Smith testified that, since the time of opposer's testimony-in-chief, when applicant brought to opposer's attention the existence of a third-

party's use of "Touch of Class" used in connection with pagers and paging services, that entity had agreed to cease use of that name in connection with pagers and paging services.

Also, opposer called Dr. Robert Sorensen, the president of Sorensen Marketing/Management Corporation, a market consulting and market research firm, as an expert to evaluate the Cogan survey. Dr. Sorensen stated that he had been retained in approximately 100 trademark cases and had testified in many of them. He offered the following criticisms of applicant's survey. First, he criticized the universe of potential respondents as not being properly defined. Dr. Sorensen indicated that people who currently use cellular phones or pagers may not be persons who intend to buy this equipment in the future (or persons who actually bought the equipment in the past), and that past purchasers of cellular phones and pagers should not have been excluded. Second, he stated that the questions posed were vague and not properly framed. Third, he indicated that, when opposer's advertisement was covered after initially being shown to respondents, the respondents were in effect being subjected to a memory test which may have biased the results against opposer. Also, according to Dr. Sorensen, it was a mistake to include In Touch Communications as a "control." Dr. Sorensen testified, at 41, 51:

A Because I think that the fundamental issue is whether or not "AirTouch" is or is not confusingly similar to "Touch Tel" or "Touch Tel Paging," and by introducing a whole group of other companies including a company that has the name In Touch Communications along with AirTouch, that the questioning itself becomes confusing and that people will, furthermore, be encouraged, again partly because of the methodology of showing the advertising and partly because of the submission of several names that people may well be encouraged to utilize other considerations than the name itself in a test where presumably the issue is one limited to names.

* * * * *

THE WITNESS: I think you're referring to the point that I had made to you that the test fundamentally here is between Touch Tel Paging and AirTouch, and the fact that other names are introduced is not only potentially confusing to the respondent but also inevitably leads to the probability that if a person is confused, and particularly, if another name that included the word "touch" is included, that that person will either choose In Touch simply because the "touch" is there; and, therefore, the issue is never really resolved between In Touch and AirTouch -- I'm sorry -- between Touch Tel and AirTouch, but instead the issue is resolved, so to speak, in favor of confusion when a term such as "In Touch Communications" is used.

He testified that a higher level of confusion might have been detected had "In Touch" not been one of the controls.

Another major criticism offered by Dr. Sorensen was that the survey should have more directly tested for

likelihood of confusion of "block letter" marks (or in capital letters without stylization) as registered or sought to be registered, as well as for the design mark.¹⁰ In this regard, Dr. Sorensen indicated that he believed the content in the advertisements displayed to the respondents was distracting and that additional factors, such as the similarities in the advertisements, may have affected the respondents' answers.¹¹ Also, the fact that some advertisements had look-alike products may also have affected the answers given.

According to Dr. Sorensen, there were an unusually high level of "Don't know" and "Not sure" responses. If these responses were eliminated from the survey, Dr. Sorensen indicated that the confusion level of those who were confused would be between 17 and 21.7 percent.

Dr. Sorensen also offered criticisms that there were no instructions concerning how to intercept survey respondents; that one of the survey locations (Dallas) was the headquarters of AirTouch Paging; that the survey assertedly did not test for reverse confusion; that there was an insufficient number of respondents surveyed, leading to a

¹⁰ In fact, Dr. Sorensen indicated that two surveys should have been conducted, one with the mark in plain capital lettering and one with the design mark including the word mark "AIR TOUCH," as depicted in the application.

¹¹ Dr. Sorensen indicated that, in his view, the In Touch advertisement was more similar to the Touch Tel advertisement than the others, and some respondents so indicated.

greater potential sampling error; and that there were problems with the validation of the survey.

Arguments of the Parties

Briefly, opposer argues that the word "TOUCH" is the dominant part of the parties' marks, the word "air" being "a generic term" in the telecommunications field (brief, 21 and reply brief, 7 n.2), and that the marks have the same meaning. With respect to the parties' goods and services, opposer argues that they are substantially identical and that these goods and services are offered through very similar channels of trade to casual and relatively unknowledgeable purchasers. Opposer also points to what it considers instances of actual confusion. Finally, opposer offers its criticisms of the Cogan survey and asks us to resolve any doubt in favor of opposer as the prior user and registrant.

Applicant, on the other hand, argues that opposer's mark is "highly suggestive" (of touching a telephone key pad in response to a page) and that the "TOUCH" portion thereof is "weak," having been used by others in connection with pagers and paging services, with customers readily distinguishing the marks as the result of other matter in the marks. Applicant contends that there is no dominant element of its mark. Applicant also argues that the respective marks are different in sound, appearance and

meaning, with applicant's mark suggesting the ability to stay in touch by use of the air waves. Applicant also points to the survey results as indicating no likelihood of confusion, and argues that it is unfair, as Dr. Sorensen has done, to include in a tabulation only those people who responded "Yes" to the question of whether they would be confused by one or more of the marks. Applicant also criticizes opposer's asserted instances of actual confusion, some of which applicant characterizes as inquiries or simple mistakes which were soon realized and corrected without prompting and not caused by any similarities in the marks. Applicant also places in the category of simple mistakes the confusion of an employee of a reseller of both parties' services who apparently called Mr. Smith "Jeff from AirTouch." Applicant argues that the Pager Store has a generic-sounding name and that customers may have thought that all models of pagers were available. Therefore, if customers call to inquire whether the store carries AirTouch pagers, this inquiry is not an example of actual confusion. These and other instances should be given little weight, according to applicant. Applicant also points out that opposer did not call any of the witnesses allegedly confused. Finally, applicant argues that the purchases here are not impulse ones and that the consumers of the parties' goods and services are sophisticated and, therefore, not

likely to be confused. Applicant points to the fact that some time must be spent with a potential paging customer and that a fairly lengthy service agreement requiring monthly airtime fees is entered into with customers.

Discussion and Opinion

Upon careful consideration of this record and the arguments of the parties, we conclude that, although some of the goods and services of the parties are, for our purposes, legally identical, applicant's marks AIRTOUCH and AIR TOUCH and design are sufficiently dissimilar from opposer's mark TOUCH TEL PAGING in appearance, sound and connotation that confusion is unlikely. These marks have obvious differences in sound and appearance, and their suggestive meanings are different. Also, opposer's mark begins with the word "TOUCH" and has a repeating "T" sound whereas applicant's mark begins with the word "AIR" and ends with the word "TOUCH." Even if these marks were used in connection with substantially identical goods and services, the dissimilarities would be sufficient to avoid confusion.

We also find that the record establishes that there is at least some care involved in the purchasing of the respective goods and/or services in the marketplace. Even if cellular phones or pagers or cellular or paging services are being purchased by average consumers, the expense involved in such purchases, as well as the typical monthly

fees involved, make for a somewhat deliberative purchasing decision.

We also believe that the instances of actual confusion which are of record are largely either inquiries or simple mistakes. If there has been actual confusion, these instances are best categorized as *de minimis* and should not lead to a finding of likely confusion. Also, we point out that applicant's witnesses, including actual purchasers or potential purchasers, testified that they were not in fact confused by the marks. Finally, the survey, while not an ideal one as it relates to issues peculiar to the Board,¹² reinforces our belief that confusion is, in fact, not likely.

¹² In particular, Dr. Sorensen's criticisms relating to the desirability of testing for confusion on the basis of "block letter" or plain capital marks (because opposer's registration and one of applicant's applications are so presented), the distractions created by the advertisements, and the use of a potentially confusing control are well taken. On the first point, see *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1459-60 (TTAB 1986) and *McDonough Power Equipment, Inc. v. Weed Eater, Inc.*, 208 USPQ 676, 685 (TTAB 1981). However, we believe that the survey did in fact test for reverse confusion when it asked if the respondents thought that any of the other companies owned or was owned by the first company (Touch Tel). Finally, opposer's criticism that the survey boards should have included more textual matter and opposer's coverage map from part of opposer's advertisement is

Decision: The oppositions are dismissed.

R. L. Simms

R. F. Cissel

E. J. Seeherman

Administrative Trademark
Judges, Trademark Trial
and Appeal Board

not understood in the light of its argument that only the word marks (and the word mark with design) should have been tested.